

From: Robinson, James H. [JHRobinson@mercurynews.com]

Sent: Tuesday, December 18, 2007 1:39 PM

To: Manheim, Tom; Herrick, Lisa; virholtz@jps.net; Dan Pulcrano; bbfishler@aol.com; zakiyasfire@yahoo.com; Beaudry, Eileen; Terrazas, Eva

Cc: James Chadwick

Subject: employee discipline followup

The policy document Tom just sent is probably best read with reference to the following San Jose municipal code sections.

Part 11 DISCIPLINARY ACTION AND DISMISSAL

Sections:

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3.04.1350 Definitions.

As used in this Part 11:

A. "Demotion" means such action by the city manager as shall cause an employee's appointment in one classification to be terminated, and an appointment to be made of such employee in another and different and lower-paid classification.

B. "Disciplinary action" means dismissal, demotion or suspension of any employee.
(Prior code §§ 2016.2, 2016.3.)

3.04.1360 Disciplinary action - Authorized when.

In conformity with this Part 11, disciplinary action may be taken against any officer or employee, except as otherwise provided by the Charter, for any cause for discipline specified in this part.

(Prior code § 2016.1.)

3.04.1370 Causes for discipline.

Each of the following constitutes cause for discipline of an employee or person whose name appears on any employment list:

A. Malfeasance;

B. Misconduct;

C. Incompetence;

- D. Failure to satisfactorily perform the duties of his position;
 - E. Failure to observe applicable rules and regulations;
 - F. Failure to cooperate reasonably with his superior officer or fellow officers or employees;
 - G. Fraud in securing appointment;
 - H. Inefficiency;
 - I. Inexcusable neglect of duty;
 - J. Insubordination;
 - K. Dishonesty;
 - L. Drunkenness on duty or drinking of alcoholic beverages;
 - M. Chronic alcoholism;
 - N. Use of narcotic or habit-forming drugs without prescription;
 - O. Inexcusable absence without leave;
 - P. Conviction of a felony or conviction of a misdemeanor involving moral turpitude;
 - Q. Discourteous treatment of the public or other employees;
 - R. Unlawful political activity;
 - S. Willful disobedience;
 - T. Misuse of city property;
 - U. Any violation of departmental conflict of interest codes approved by the city council and adopted pursuant to Chapter 7 of the Political Reform Act of 1974 (Government Code § 87100);
 - V. Any other act, either during or outside of duty hours which is detrimental to the public service.
- (Prior code § 2016.4; Ord. 18502.)

3.04.1380 Disciplinary action - Notice requirements.

A. The appointing authority may take disciplinary action against an employee for one or more of the causes for discipline specified in this part, as follows:

1. Where the contemplated discipline is a demotion, dismissal or suspension, by personally serving the employee with a written "notice of intended discipline," setting forth the specific nature thereof, the length and commencement date if it be a suspension, and the reasons for the proposed discipline, along with a copy of the charges and materials upon which the action is based. Said "notice of intended discipline" shall also advise the employee that he has five calendar days in which to respond either personally or in writing at an informal hearing before the department head making the charges or the appointing authority-or the person designated by either-and may appear with counsel or representative, to show cause, if any, why such discipline should not be imposed; provided, however, that said five-day period may be extended by department head or appointing authority upon the employee's timely request in writing and for reasons of employee's convenience and necessity.

B. No disciplinary action of any type or duration shall be valid unless a formal written notice thereof is served upon the employee and filed with the secretary of the commission within seventy-two hours of the effective date of the discipline. Such notice of suspension, demotion or dismissal shall be served upon the employee either personally or by mail and shall include:

1. A statement of the nature of the disciplinary action;

2. A statement in ordinary, concise language of the acts or omissions upon which the causes are based;
 3. The effective date of the action; and
 4. A statement advising the employee of his right to answer and setting forth that the response must be made within the time period specified in the notice of suspension, demotion or dismissal, if his answer is to constitute an appeal.
- C. The procedures set forth hereinabove shall not apply to probationary employees who are rejected from probation, pursuant to Section 3.04.1010 of the San José Municipal Code.
- D. The procedures set forth hereinabove shall not preclude an employee from entering into a written agreement with the city to settle a pending disciplinary matter, and further shall not preclude an employee from waiving any of the notice provisions, hereinabove provided for, as part of that written settlement agreement. A copy of any such disciplinary settlement agreement shall be filed with the commission.
- (Prior code § 2016.5; Ords. 20017, 20893.)

3.04.1390 Answer to notice of discipline - Filing.

Not later than twenty days after service of the notice of disciplinary action, the employee may file with the commission a written answer to the notice, which answer shall be deemed to be a denial of all of the allegations of the notice of disciplinary action not expressly admitted, and a request for hearing or investigation as provided in this part. With the consent of the commission, an amended answer may be filed. If the employee fails to answer within said twenty calendar days, or after answer withdraws his appeal, the disciplinary action taken by the appointing authority shall be final. A copy of the employee's answer, and of any amended answer, shall be given promptly by the secretary of the commission to the appointing authority.

(Prior code § 2016.6; Ord. 20801.)

3.04.1400 Amended or supplemental notices.

At any time before an employee's appeal is submitted to the commission for decision, the appointing authority may, with the consent of the commission, serve on the employee and file with the commission an amended or supplemental notice of disciplinary action. If the amended or supplemental notice presents new causes or allegations, the employee shall be afforded a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further answer unless the commission so orders. Any new causes or allegations shall be deemed controverted and any objections to the amended or supplemental causes or allegations may be made orally at the hearing or investigation and shall be noted in the record.

(Prior code § 2016.7.)

3.04.1410 Hearing - Procedures and requirements generally.

A. Whenever an answer is filed to a disciplinary action, the commission shall hold a hearing within forty-five days from and after the date on which said answer is filed, or at such other time as may be agreed to by the officer or employee filing the answer and the commission. The commission shall notify the parties in writing of the time and place of the hearing, which shall be open to the public and held in the council chambers or other

regular meeting place of the commission. The hearing shall be presided over by a member of the civil service commission who is admitted to practice law in the supreme court of the state, and he shall rule on all questions of the sufficiency of the charges, procedures, and the admission and exclusion of evidence. Such hearing shall be conducted in accordance with the provisions of Section 11513 of the Government Code, which reads as follows:

1. Oral evidence shall be taken only on oath or affirmation.
2. Each party shall have these rights: to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him to testify; and to rebut the evidence against him. If respondent does not testify in his own behalf, he may be called and examined as if under cross-examination.

3. The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, and irrelevant and unduly repetitious evidence shall be excluded.

B. Either by deposition or at the hearing, the employee may be examined and may examine or cause any person to be examined under Section 776 of the Evidence Code. The employee shall be allowed to appear personally at the hearing, and he shall have the right to legal counsel or lay representation of his choice at all times throughout the proceeding, and be allowed to produce such competent evidence in his own defense and in rebuttal of the charges as he or his counsel may wish to offer.

C. The commission shall supply a phonographic or stenographic reporter to record all testimony adduced at the hearing. Either the commission or employee may order a transcript of the hearing to be prepared, and such transcript shall be filed with the commission as a public record. If such transcript is ordered by the employee, he shall pay the cost thereof. If such transcript is ordered by the commission, the cost thereof shall be paid from money appropriated therefor by the council.

(Prior code § 2016.8; Ords. 18347, 18394.)

3.04.1420 Subpoena power.

In any hearing conducted by the commission, it shall have the power to subpoena and require the attendance of witnesses, and the production of books, papers and other evidence pertinent to the investigation and to administration of oaths to witnesses.

(Prior code § 2016.11.)

3.04.1430 City attorney to represent appointing authority.

At any and all hearings conducted hereunder, the city attorney or his authorized representative shall represent the appointing authority.

(Prior code § 2016.16.)

3.04.1440 Failure to appear.

Failure of the employee to appear at the hearing shall be deemed a withdrawal of his answer and the action of the appointing authority shall be final.

(Prior code § 2016.9.)

3.04.1450 Findings and decision.

A. In arriving at a decision, the commission may consider any prior suspension or suspensions of the employee by authority of any appointing authority, or any prior proceedings under this chapter. The decision shall be in writing and contain findings of fact and the disciplinary action, if any. The findings may be stated in the language of the pleadings or by reference thereto. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail.

B. The commission shall render a decision within a reasonable time after the hearing or investigation. The disciplinary action taken by the appointing authority shall stand unless modified or revoked by the commission. If the commission finds that the cause or causes for which the disciplinary action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the disciplinary action and it may order the employee returned to his position, either as of the date of the disciplinary action or as of such later date as it may specify. The decision of the commission shall be entered upon the minutes of the commission.

(Prior code § 2016.10.)

3.04.1460 Effect of dismissal.

Dismissal of an employee from the service shall, unless otherwise ordered by the commission:

A. Result in the automatic removal of the employee's name from any and all eligible lists on which it may appear;

B. Terminate the salary of the employee as of the date of dismissal, except that he shall be paid any unpaid salary, and be paid for any and all unused and accumulated vacation, and any and all accumulated compensating time off or overtime to his credit as of the date of dismissal.

(Prior code § 2016.12.)

3.04.1470 Salary when disciplinary action modified.

Whenever the commission revokes or modifies a disciplinary action and orders that the employee be returned to his position, it shall direct the payment of salary to the employee for such period of time as the commission finds the disciplinary action was improperly in effect. Salary shall not be authorized or paid for any portion of a period of disciplinary action that the employee was not ready, able and willing to perform the duties of his position, whether such disciplinary action is valid or not, or the causes on which it is based state facts sufficient to constitute cause for discipline.

(Prior code § 2016.13.)

3.04.1480 Petition for rehearing.

A. Within fifteen days after the receipt of a copy of the decision rendered by the commission in a proceeding under this part, the employee or the appointing authority may apply for a rehearing by filing with the commission a written petition therefor. Within fifteen days after such filing, the commission shall cause notice thereof to be served upon the other parties to the proceedings by mailing to each a copy of the petition for rehearing, in the same manner as prescribed for notice of hearing.

B. Within forty-five days after service of notice of filing of a petition for rehearing, the commission shall either grant or deny the petition in whole or in part. Failure to act upon a petition for rehearing within this forty-five-day period is a denial of the petition.

(Prior code § 2016.14.)

3.04.1490 Rehearing - Procedures.

If the petition for rehearing is granted, the matter shall be set down for hearing by the commission. The hearing shall be conducted as to the matters on which granted in substantially the same manner and under like rules of procedure as an original hearing upon charges under this part.

(Prior code § 2016.15.)

Part 12 SUSPENSION, DEMOTION, DISMISSAL AND RESIGNATION

Sections:

[3.04.1500 Disciplinary action.](#)

[3.04.1510 Voluntary demotion.](#)

[3.04.1520 Resignation.](#)

[3.04.1530 Reemployment following resignation.](#)

[3.04.1532 Medical standards on reemployment.](#)

[3.04.1534 Notice of rejection and appeal on reemployment medical standards.](#)

[3.04.1540 Nondisciplinary removal from a class.](#)

3.04.1500 Disciplinary action.

This section is applicable to each employee of the city holding a regular position in the classified service, other than persons holding such positions by virtue of emergency or provisional appointments, who has satisfactorily served his or her probationary period of service in such position; hereinafter referred to as "covered employees."

A. No covered employee may be suspended without pay, demoted or dismissed from his or her position in the classified service, except for cause such as, but not limited to:

1. Malfeasance;
2. Misconduct;
3. Incompetence;
4. Insubordination;
5. Inefficiency;
6. Failure to satisfactorily perform the duties of his or her position;
7. Failure to satisfactorily observe applicable rules and regulations; or
8. Failure to cooperate reasonably with his or her superior or fellow officers or employees.

B. Any such covered employee shall be given a written notice of his or her suspension, demotion or dismissal, in the manner and within the time specified in the civil service rules, not to exceed seventy-two hours from the time of such reduction in pay, suspension, demotion or dismissal. The notice shall contain a statement of the specific reason or reasons for the suspension, demotion or dismissal.

C. The covered employee may appeal to the civil service commission for a review of the suspension, demotion or dismissal by filing a written notice of appeal with the secretary of the commission within the time specified in the civil service rules, not to exceed thirty days from the date he or she is given the written notice. The notice of appeal shall contain such answer as the covered employee may have to the charges made against him or her. The secretary of the commission shall immediately transmit a copy of the notice of appeal, including the answer, to the appointing authority.

D. A hearing on the appeal, at which the commission or a hearing officer designated, as the commission may determine as hereinafter specified, shall be held to review the action of suspension, demotion or dismissal. The hearing shall be held within forty-five days from the date on which the notice of appeal is filed, or at such other time as may be agreed to by the covered employee and the civil service commission. If the appeal is to an action of dismissal, the hearing may be held by a hearing officer only with the express consent of the covered employee.

E. If the commission determines that the hearing shall be held by a hearing officer, it shall note such order in its minutes, and the clerk of the commission shall notify the parties of such order; within not less than ten days before the date of hearing. If the appellant and the appointing authority are otherwise unable to agree upon the person to act as hearing officer, each shall designate the names of five proposed hearing officers. The names on the list shall be stricken individually in succession by the parties alternately commencing with the appointing authority or his or her representative, until only one name remains on the list. If the commission approves the person so designated, he or she shall be appointed by the commission as the hearing officer to hear the appeal. If the commission does not approve the person to act as hearing officer in such appeal, the parties shall propose additional names and alternately strike names from the list or lists, until the commission approves a person to be appointed by the commission as the hearing officer to hear the appeal. Reasonable fees and expenses of such hearing officers shall be paid by the city from moneys appropriated for this purpose by the council.

F. At the hearing, both the covered employee and the appointing authority whose action is being reviewed, and their respective representatives, shall have the right to be heard and to present evidence. If an appeal is heard by a hearing officer, he or she shall prepare a proposed decision, in such form as may be adopted by the commission as the decision in the case. A copy of the proposed decision shall be filed by the commission as a public record, and copies shall be furnished to each party within ten days after the proposed decision is filed with the commission. Either the commission or the covered employee may order a transcript of the hearing to be prepared, and the transcript shall be filed with the commission as a public record. If such transcript be ordered by the covered employee, he or she shall pay the cost of the transcript. If a transcript is ordered by the commission, the cost shall be paid from moneys appropriated for this purpose by the council.

G. Within a reasonable time after the proposed decision is filed, the commission shall consider the proposed decision. If the proposed decision is not adopted as recommended

by the hearing officer, each party shall be notified of this action. The commission may then decide the case on the record, including the transcript, if any, with or without taking any additional evidence, or may hear the case de novo, or may refer the case to the same or another hearing officer to take additional evidence. If oral evidence in addition to the written record is introduced before the commission, no member of the commission may vote unless he or she has heard the additional oral evidence. If the case is assigned to a hearing officer, he or she shall prepare a proposed decision as provided above upon the additional evidence and the transcript, if any, and other papers which are part of the record of the prior hearing. A copy of the proposed decision shall be furnished to each party and filed by the commission as provided in this section. Either the commission or the appellant covered employee may request a transcript of such additional evidence to be prepared, and the transcript shall be filed with the commission as a public record. If the transcript is ordered by the appellant covered employee, he or she shall pay the cost of the transcript. If the transcript is ordered by the commission, the cost shall be paid from moneys appropriated for this purpose by the council.

H. If, after the hearing, the civil service commission concludes that the suspension, demotion or dismissal was without cause, it shall order reinstatement without loss of pay, and the order shall be binding upon the appointing authority, who shall comply with the order. In the event that the civil service commission, after the hearing, concludes that there was cause for disciplinary action but that the type of penalty was not warranted under the circumstances, it may, in its discretion, order reinstatement with loss or partial loss of pay, and such order shall be binding upon the appointing authority, who shall comply with the order. In the event the civil service commission concludes that the officer or employee is unqualified for or unable for other reasons to satisfactorily perform the duties of his or her office or position but is qualified for and can perform the duties and functions of a lower position, it may, in its discretion, order demotion and employment of such officer or employee to and in a lower class of position or employment or may order that the person's name be placed on an eligible list for employment in a lower class of position or employment if and when a vacancy occurs, and the order shall be binding upon the director of human resources and the appointing authority, who shall comply with the order.

I. If, after the hearing, the civil service commission concludes that the suspension, demotion or dismissal was for adequate cause and that the action taken by the appointing authority was warranted, the commission shall affirm the action of the appointing authority.

J. Except when the proposed decision by a hearing officer is adopted in its entirety, the commission shall decide no case provided for in this section without affording the parties an opportunity to present oral and written argument before the commission.

K. In arriving at a decision or a proposed decision in any case provided for in this section, the commission or the hearing officer may consider any prior discipline imposed upon the appellant.

L. The decision of the commission shall be in writing and shall contain findings of fact and the disciplinary action, if any. The findings may be stated in the language of the pleadings or by reference to the pleadings. Copies of the decision shall be delivered to the parties personally or sent to them or either of them by certified mail.

M. Subject to such reasonable limitations and restrictions as may be set forth in the civil service rules, the civil service commission may grant a rehearing if good cause is shown. (Ord. 25635.)

-----Original Message-----

From: Manheim, Tom [mailto:tom.manheim@sanjoseca.gov]

Sent: Tuesday, December 18, 2007 1:15 PM

To: Robinson, James H.; Manheim, Tom; Herrick, Lisa; virholtz@jps.net; Dan Pulcrano; bbfishler@aol.com; zakiyasfire@yahoo.com; Beaudry, Eileen; Terrazas, Eva

Cc: James Chadwick

Subject: RE: employee misconduct

Attached is the City Policy on discipline we discussed yesterday.

From: Robinson, James H. [mailto:JHRobinson@mercurynews.com]

Sent: Tuesday, December 18, 2007 12:18 PM

To: Manheim, Tom; Herrick, Lisa; virholtz@jps.net; Dan Pulcrano; bbfishler@aol.com; zakiyasfire@yahoo.com; Beaudry, Eileen; Terrazas, Eva

Cc: James Chadwick

Subject: FW: employee misconduct

Here are some questions that I would pose after reading the City Attorney's memo on employee misconduct. Feel free to share these with anyone who might be interested.

I mentioned this yesterday, but if there is any city policy or written procedure on misconduct findings, hearings, etc., it would help immensely for the subcommittee members to get a copy.

Your memo lays out four issues that would govern disclosure of information regarding employee misconduct:

- 1.) What level is the employee?
- 2.) What kind of records are being sought?
- 3.) What is the nature of the misconduct?
- 4.) What level of evidence supports the allegations?

Let me go through those, summarizing what I think I'm getting from the memo and asking additional questions.

The level of the employee

As I read your memo, you suggest that the case law on disciplinary records treats "public employees" differently from "public officials." Which city officials are public officials, and which are public employees? The more specific you can make this answer, the better.

The level of evidence supporting the allegations

I'm now going to attempt to summarize what I think your memo says regarding the level of evidence that must support an allegation in order for it to be disclosed. The level varies, as I understand it, depending on whether we are talking about a public official or a public employee. In neither case is the standard that the charges must be true, or that

discipline has actually been imposed; in fact, it seems to me that the standard is lower than that, and that cases where charges are true or discipline has been imposed easily clear the "level of evidence" hurdle.

- For public employees, the language from Bakersfield applies -- "where the allegations are substantial in nature, as distinct from baseless or trivial, and there is reason to believe the complaint is well founded."
- For public officials, the language from BRV applies -- where "the allegations are not so unreliable that they could not be anything but false."

Is that correct?

The kinds of records that must be disclosed

The only indication your memo relays as to the kinds of records that must be released is the AFSCME standard: "information about the complaint, the discipline and the information upon which it is based." Am I reading that right? Can you tell us what sorts of records would meet that standard and what records would not meet that standard?

The nature of the misconduct

The only thing I see in your memo that goes to the nature of the alleged misconduct would be Bakersfield, assuming it can be read in that way: "where the allegations are substantial in nature, as distinct from baseless or trivial." Does that mean that any allegations regarding offenses that are more than trivial would meet the threshold for the "nature of the alleged misconduct" that has to be disclosed? What kinds of misconduct would the city regard as trivial? Or is there another standard for the level of seriousness that you would propose?

Here are some additional questions:

Is the language the subcommittee has already recommended on investigations -- which would protect the identities of employees who provide information in an internal investigation -- sufficient to allay the concerns in part 2 of your memo? If not, what would be?

Could the city be liable for revealing information about an employee which is required to be revealed under the CPRA? Under the sunshine law?

Do you see any other legal obstacles for the city if it tried to interpret the legal standards articulated in AFSCME, Bakersfield and BRV and write them into the sunshine law?